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Jena McGill

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Jena McGill
University of Ottawa

On October 19, 2007, Ashley Smith, a nineteen-year-old Aboriginal woman from Moncton, New Brunswick, was found dead in her segregation cell at the Grand Valley Institution, a federal woman's prison in Kitchener, Ontario. Smith spent the majority of her life in federal institutions across Canada, effectively cutting her off from her family and her community. During her incarceration, a prison guard was charged with assaulting Ms. Smith, she was forcibly strapped to a confinement chair, and she had her clothing taken away on multiple occasions, leaving her naked and cold. At the time of her death, Ashley Smith was isolated in segregation, with only an oversized security gown to wear and no mattress in her cell, forcing her to sleep on the concrete floor without a blanket. The treatment she experienced while in the custody of the Correctional Service of Canada (CSC) was inhumane. It was also illegal. This paper situates discriminatory treatment against federally sentenced Aboriginal women in Canada in the international legal context, arguing that the CSC's treatment of Ms. Smith, and countless other Aboriginal women in federal prisons, amounts to an infringement of Canada's obligations under the United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), and is therefore a violation of public international law. Despite numerous studies, inquiries, task force recommendations, and a domestic human rights complaint and resulting investigation into the treatment of Aboriginal women in custody, Canada (as represented by CSC) is failing to live up to its international legal commitments by continuing to mistreat federally sentenced Aboriginal women with relative impunity. The present inquiry draws upon existing research and factual reports to reveal the sexist, racist and neocolonial nature of the discrimination experienced by federally sentenced Aboriginal women and considers the possibility of employing CEDAW as a tool to draw international attention to discrimination against federally sentenced Aboriginal women in Canada.

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Introduction

On October 19, 2007, Ashley Smith, a nineten-year-old Aboriginal woman from Moncton, New Brunswick, was found dead in her segregation cell at the Grand Valley Institution, a federal woman's prison in Kitchener, Ontario.[1] Smith had spent "nearly a quarter of her life in prison . . . [having] been transferred through a series of federal institutions," across Canada, effectively cutting her off from her family and her community.[2] During her incarceration, a prison guard was charged with assaulting Ms. Smith, she was forcibly strapped to a confinement chair, and she had her clothing taken away on multiple occasions, leaving her naked and cold. At the time of her death, Ashley Smith was isolated in segregation, with only an oversized security gown to wear and no mattress in her cell, forcing her to sleep on the concrete floor without a blanket.[3] The treatment that she experienced while in the custody of the Correctional Service of Canada (CSC) was inhumane. It was also illegal.

This paper situates discriminatory treatment against federally sentenced[4] Aboriginal[5] women in Canada by CSC in the international legal context. I argue that CSC's treatment of Ashley Smith, like that of countless other Aboriginal women in federal prisons, amounts to an infringement of Canada's obligations under the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW),[6] and is therefore a violation of public international law.[7] Despite numerous studies, inquiries, task force recommendations, and a domestic human rights complaint and resulting investigation into the treatment of Aboriginal women in custody, Canada, as represented by CSC, is failing to live up to its international legal commitments by continuing to mistreat federally sentenced Aboriginal women with relative impunity. CEDAW therefore has the potential to be a useful tool for drawing international attention to Canada's shortcomings in its treatment of federally sentenced Aboriginal women, and may contribute to the beginnings of actual change in this area.

Despite numerous studies, inquiries, task force recommendations, and a domestic human rights complaint and resulting investigation into the treatment of Aboriginal women in custody, Canada, as represented by CSC, is failing to live up to its international legal commitments by continuing to mistreat federally sentenced Aboriginal women with relative impunity.

In advancing this argument, Part II of the paper provides some brief context by situating Aboriginal women within Canada's colonial prison system. Part III then reviews Canada's obligations as a signatory to CEDAW and identifies Articles 1, 2, and 3 as of particular importance in arguing for Aboriginal women's right to be free from discriminatory treatment by CSC. In Part IV, I draw upon existing research and factual reports to reveal the sexist, racist nature of the discrimination experienced by federally sentenced Aboriginal women in three specific areas, and to highlight the ways in which this treatment

violates CEDAW. Part V concludes with a cursory consideration of the likely utility of CEDAW as a mechanism for addressing discrimination against federally sentenced Aboriginal women in Canada by examining the possibility of issuing an international complaint based on Canada's CEDAW violations in this area. At the outset of this work, I situate myself as a white woman with no experiential grounding in Aboriginality, and acknowledge that this is a limitation of my analysis.

Finally, by way of introduction, I note that while CEDAW is aimed primarily at eliminating discrimination against women on the basis of sex, "for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men,"[8] it is both impossible and unrealistic to divorce the ground of sex from other grounds of oppression, including that based on race, class, sexual orientation, (dis)ability, language, and marital status, all of which inform the nature of discrimination that different women experience. Aboriginal women may reside at the nexus of any number of these identities; however, their experience is necessarily informed by both sex and race such that, like "[a]ll women of colour," they live at locations characterized as "the dangerous intersections of gender and race."[9] This reality requires that the character of the discrimination faced by federally sentenced Aboriginal women be understood as the result of interlocking forms of domination, acknowledging "that each system of oppression relie[s] on the other to give it meaning, and that this interlocking effect [can] only be traced in historically specific ways."[10]

Understanding systems of domination as interlocking and thereby as mutually constitutive illuminates "the complex ways in which they help to secure one another."[11] In other words, the discrimination experienced by federally sentenced Aboriginal women cannot be defined as the result of an additive formula of "sex + race = double discrimination" or even "sex + race + criminality = triple discrimination." Instead, the discrimination that is the subject of this paper is understood as a compound form of discrimination distinct in character from that which might be experienced on the grounds of sex or race alone. As an amalgam, such discrimination cannot necessarily be distilled to extract the discriminatory acts based the ground of sex from those undertaken on the ground of race, so that practically speaking, the individual effects of discrimination based on race and that based on sex often "cannot be distinguished in the examination of specific acts, policies or programs."[12] The instances of discrimination experienced by federally sentenced Aboriginal women are wholly unique. While the analysis presented here focuses upon the ways in which discrimination against federally sentenced Aboriginal women violates CEDAW, an international instrument concerned with the elimination of sex-based discrimination, there is room within the CEDAW framework for the recognition of the myriad connections between sex and race-based discrimination and for claims to be brought on

the basis of these and other interlocking forms of oppression that define different women's experiences of discrimination. Importantly to this end, CEDAW's Preamble notes, "the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, [and] aggression . . . is essential to the full enjoyment of the rights of men and women."[13]

Aboriginal Women, Colonialism And The Canadian Prison System

Federally Sentenced Aboriginal Women

Aboriginal women[14] are grossly overrepresented in Canadian prisons, composing approximately one-third of the total population of federally sentenced women, though they represent less than 3 percent of the population of Canada.[15] This disparity is "[n]ot only the most obvious layer of discrimination, but [also] the most frequently cited."[16] The overrepresentation of Aboriginal women and men in the Canadian criminal justice system is the result of a multitude of interrelated factors including the following: entrenched and systemic racism resulting in the overpolicing and overcharging of Aboriginal populations, uninformed and inadequate legal representation for Aboriginal offenders,[17] and structural barriers including misunderstandings and misinterpretations by non-Aboriginal judges of the actions, reactions, and demeanor of Aboriginal people in the courtroom, which can negatively impact on their sentencing.[18] Once incarcerated, Aboriginal women are 14 percent less likely to be released into the community on conditional release than non-Aboriginal women,[19] are generally released later in their sentences than non-Aboriginal prisoners, and "often do not receive timely access to rehabilitative programming and services that would help them return to their community."[20]

These statistics speak largely for themselves. The overrepresentation of Aboriginal women and men in federal prisons has been rightly characterized as "indisputably the most egregious example of the racist legacy of colonization."[21] Indeed, the vestiges of colonialism that endure in Canada include both overt racism against Aboriginal persons and the systemic cultural, economic and geographical oppression that circumscribes the lives of Aboriginal people both in and outside of prison. Aboriginal women experience this oppression by virtue of both their race and gender as a result of the "gendered specificity of colonialism [which] is an essential component to understanding the present day situation of Aboriginal women in prison."[22] Gender and the legacy of colonialism combine to produce effects including the disproportionate impoverishment of Aboriginal women,[23] and a high likelihood that Aboriginal women will experience "violence, alcohol abuse, sexual assault during childhood, rape and other violence . . . at the hands of men."[24] While 68 percent of federally sentenced women report being physically abused, this figure jumps to 90 percent for Aborigi-

nal women.[25] Many may be dealing with drug or alcohol addictions and physical or mental health concerns.[26] CSC describes the "average" federally sentenced Aboriginal woman in the following profile:

> [She is] 27 years old, with a limited education (usually grade nine), is unemployed or under-employed, and the sole-support mother to two or three children. She is usually unemployed at the time of she is arrested. She has often left home at an early age to escape violence. She may be forced to sell her body because she needs money and is unable to obtain a job. She is likely to have been subjected to racism, stereotyping and discrimination because of her race and color. However, her experience on the streets becomes violent as she continues to experience sexual, emotional and physical abuse. She is likely to become involved in an abusive relationship.[27]

These statistics and descriptors of federally sentenced Aboriginal women, themselves products of a colonial government, are indicative of "the utter totality of the experience of violence in Aboriginal women's lives," resulting in large part from "the devastation that colonization has wrought on Aboriginal peoples."[28] The persistence of violence against Aboriginal women in Canadian prisons must therefore be understood as symptomatic of a much larger, deeply disturbing trend in Canadian society and in the Canadian legal system, that accepts as "normal" the systematic devaluation of Aboriginal women and continues to overtly ignore discrimination and violence perpetrated against them both in and out of prison.

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The "Normalization" of Violence against Aboriginal Women

The Canadian criminal justice system is likely to be experienced by Aboriginal women as a foreign and inappropriate vehicle for the fulfillment of justice in their communities. Aboriginal "understandings of law, of courts, of police, of the judicial system, and of prisons are set by lifetimes defined by racism" and characterized by "institutional neglect,"[29] resulting in a "climate of distrust where Aboriginal people see this is not a system of justice, which equally represents them."[30] The present-day criminal justice system is a continuation of the historical colonization of Aboriginal persons, perpetuated by contemporary "spatial strategies of containment . . . and incarceration,"[31] such that the dehumanizing discrimination against Aboriginal women that occurs in the spaces of prison is not a unique phenomenon, but a modern-day example of a long history of colonial practices that have regarded, and continue to create and regard Aboriginal women's bodies as "rapable and violable,"[32] and invite actors to behave accordingly.[33]

Patriarchy, misogyny, and racism are among the tools employed in the colonial project of maintaining the violability Aboriginal women, and indeed these trappings of Canada's colonial hangover continue to characterize the institutional structure of our prisons, making it little wonder that misogyny and racism run rampant in the prison environment,[34] or that the race and gender values associated with patriarchy and racism operate to "deem certain bodies and subjects . . . as undeserving of full personhood."[35] Against this backdrop, federally sentenced Aboriginal women are "especially marked in the eyes of the administrations of the prisons where women do time and in the eyes of the staff who guard them."[36] Within the particular colonial space of prison, Aboriginal women are confined, controlled, devalued and dehumanized on the basis of their womanhood and their Aboriginality together.

The dehumanizing of Aboriginal women is made possible by the internalization and normalization of this process within the prison institution and in Canadian society writ large. Spatial analysis reveals that raced and gendered bodies in degenerate spaces, like prisons, may "lose their entitlement to personhood through a complex process in which the violence that is enacted [upon them] is naturalized."[37] It is a vicious cycle: the normalizing of discriminatory practices results in the dehumanizing of Aboriginal women in prison spaces, and their dehumanization contributes to the willingness of CSC systems and staff to continue to discriminate against them with apparent indifference—if Aboriginal women do not "qualify" as human, "nobody" is being harmed. As "nobodies," Aboriginal women are deemed valueless and are thus "rapeable," perpetual victims, instead of being seen as rights-bearing citizens. Aboriginal women thereby occupy a dangerous location in federal prisons, constructed as both invincible—as "nonpersons" they do not suffer the injuries and harms of discrimination—and invisible—because as "nonpersons" they have no rights to infringe or enforce.

A further consequence of the widespread normalization of the dehumanizing of Aboriginal women is that the discrimination and violence they experience is deemed largely acceptable and inevitable, and is thereby not taken seriously by Canadian society or the Canadian government itself. The chronic, systemic construction of Aboriginal women as violable and unworthy of concern contributes to the relative impunity with which violence against them continues to occur in and out of prison spaces. This trend has been ably documented by organizations including Amnesty International, which, in its 2004 report, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*,[38] documents three decades-worth of stories of Aboriginal women and girls missing or murdered in Canada, and an alarming pattern of police and government disregard for these women and their cases.[39] Based on its research, Amnesty International concludes that in "every instance, Canadian authorities could and should

have done more to ensure the safety of these women and girls."[40] Similarly, the Native Women's Association of Canada (NWAC) mounted its Sisters in Spirit campaign in 2005 in response to the mysterious deaths and disappearances of more than five hundred Aboriginal women in Canada and the resulting disregard of the Canadian state. NWAC's main objective in launching this campaign was "to address violence against Aboriginal women, particularly racialized and/or sexualized violence, that is, violence perpetrated against Aboriginal women because of their gender and Aboriginal identity. This type of violence typically occurs in the public sphere, where *societal indifference often leaves Aboriginal women at greater risk.*"[41]

Despite what the deplorable CSC practice and the general lack of police and government concern with discrimination against federally sentenced Aboriginal women indicate, Aboriginal women in prison *do,* of course, possess human rights, the violations of which must not be trivialized "as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner."[42] Aboriginal women's rights, both within prison spaces and elsewhere, are embodied in international law in CEDAW.

The Convention On The Elimination Of All Forms Of Discrimination Against Women

CEDAW's Objectives

CEDAW is "rooted in the broader goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity, value and worth of the human person, in the equal rights of men and women."[43] The Convention was adopted by the United Nations General Assembly on December 18, 1979,[44] and entered into force as an international treaty on September 3, 1981 after the twentieth member state had ratified the document.[45] Consisting of a Preamble and thirty articles, CEDAW is often described as "an international bill of rights for women,"[46] providing an agenda for national action to guarantee the enjoyment of women's rights and equality under three broad umbrellas: civil rights and the legal status of women;[47] reproductive rights;[48] and the impact of culture and tradition on gender relations and women's enjoyment of their fundamental rights.[49]

The CEDAW document recognizes that its ultimate goal of ensuring fundamental rights for women will only be accomplished by putting an end to discrimination based on sex in all spheres of life. In setting the tone guiding the interpretation of CEDAW's operative articles, the Preamble explicitly acknowledges that "extensive discrimination against women continues to exist," and emphasizes that such discrimination "violates the principles of equality of rights and respect for human dig-

nity."[50] In Article 1, CEDAW defines discrimination against women as:

> . . . any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[51]

Article 2 places responsibility on national governments of states parties to the Convention to "condemn discrimination against women in all its forms, [and] to pursue by all appropriate means and without delay a policy of eliminating discrimination against women…".[52] Governments must, under Article 2(d) of CEDAW "refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions . . . act in conformity with this obligation." In accordance with Article 2(f), CEDAW signatories are required to take measures necessary to "modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women," including the revocation of "all national penal provisions which constitute discrimination against women," as specified in Article 2(g).

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Complementing the mandate of Article 2 to put an end to discrimination, Article 3 of CEDAW requires states parties to take a proactive approach to women's rights by adopting "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."[53] Some of the "appropriate measures" anticipated by Articles 2 and 3 are enumerated in the CEDAW document and include the following: the incorporation of the principle of equality of men and women into national legal systems;[54] the establishment of tribunals and other public institutions to ensure the effective protection of women against discrimination;[55] and the adoption of temporary special measures aimed at "accelerating de facto equality between men and women."[56] At least every four years, state parties must submit a national report to the UN Committee on the Elimination of Discrimination Against Women (the Committee),[57] demonstrating the measures they have adopted to give effect to the provisions of the Convention.[58]

Canada and CEDAW

Canada was among the first countries to sign on to CEDAW on July 17, 1980, at the World Conference for the United Nations Decade for Women, and it ratified the Convention on De-

cember 10, 1981.[59] Like all states parties to the Convention, Canada is legally bound[60] to put CEDAW's provisions, including Articles 1, 2, and 3, noted above, into practice by taking action required to eliminate all forms of discrimination against women, as well as adopting positive steps to ensure that women enjoy the conditions necessary for the enjoyment of their fundamental rights and freedoms. In addition to Canada's general obligation to fulfill these requirements under CEDAW, CSC in particular has endorsed and made a specific commitment to adhering to all international human rights instruments to which Canada is a party, stating, " . . . any correctional authority should adhere to both binding and other international human rights instruments that have been approved by the state concerned before the international community. CSC should therefore consider itself bound by such instruments that have been endorsed by the Government of Canada."[61] Despite this lofty oratory, CSC's policies and practices indicate that far from enforcing and upholding the values embodied in CEDAW, CSC is routinely responsible for subjecting federally sentenced Aboriginal women to systematic discrimination that violates their human rights—precisely the evil that CEDAW seeks to eliminate.

Discrimination Against Federally Sentenced Aboriginal Women In Violation Of Canada's CEDAW Obligations

Numerous inquiries, investigations, research, and reports have documented and analyzed CSC policies and practices infringing the rights of federally sentenced women over the past two decades.[62] While a full consideration of each of these important documents is beyond the scope of the present inquiry, these documents have, individually and taken together, unequivocally established that federally sentenced women are regularly subjected to discrimination that is "an amalgam of: stereotypical views of women; neglect; outright barbarism and well-meaning paternalism,"[63] and that such treatment is most certainly captured by CEDAW's Article 1 definition of discrimination. The current research further demonstrates that Aboriginal women face compounded discrimination on the basis of their sex and their Aboriginality, in part a product of CSC's ongoing "failure to rigorously consider the structure and impact of the [prison] system on Aboriginal women result[ing] in continued disadvantage and discrimination beyond the travesty of over-representation."[64] Consistent among the findings of all existent reports and research is the conclusion that discrimination against federally sentenced Aboriginal women occurs at many levels of their prison experience, three of which I consider here: security classification policies and practices; discriminatory treatment based on race and gender stereotypes; and a lack of gender-sensitive and culturally appropriate programming. Interlocking forms of sex and gender discrimination in each of

these areas infringes at least one or all of Articles 1, 2, and 3 of CEDAW.

Security Classification Policies

The overrepresentation of Aboriginal women in the federal prison system is most pronounced among prisoners classified as maximum security, where Aboriginal women represent approximately 50 percent of the inmate population.[65] This fact is neither accidental nor incidental; the Correctional Investigator recently concluded that CSC "routinely classifies First Nations, Métis and Inuit women as higher security risks than non-Aboriginal women in prison."[66] Describing their prison experiences, Lana Fox and Fran Sugar state, "security classifications . . . were applied to us because as Native women we were seen as a collective, as a war party that posed a risk to the good order of the institution."[67] Reports indicate that an Aboriginal woman is likely to be segregated more often during her prison sentence and for longer periods of time than a non-Aboriginal woman,[68] often with no idea how long she will be there, and no assurances that her needs will be addressed. Justice Louise Arbour's 1996 investigation of Kingston's now-inoperative Prison for Women led her to conclude "that prolonged segregation is a devastating experience, particularly when its duration is unknown at the outset and when the inmate feels that she has little control over it."[69]

In assigning security classifications to inmates, CSC evaluates women with the same assessment tool designed for men. The security evaluation includes an assessment of the level of risk posed to public safety if a given inmate were to escape, despite the fact that generally speaking women pose a near-negligible threat of reoffending, "suggesting that there is actually no need for an assessment of women based on [this] risk."[70] An inmate's social history is also factored into the security classification equation by way of a so-called "needs assessment," which considers factors related to education and employment, social interaction, marital or family status, history as a victim of violence, sexual habits or preferences, addictions, physical or mental illnesses, disabilities and attitude.[71] Put crudely, a low level of education or employment training combined with past experiences of violence, an addiction, and a nonheterosexual or nonmonogamous sexual history are likely to classify a woman as having "high needs," and "the greater number of identified needs, the higher the resulting security classification."[72]

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As outlined briefly in Part II, above, Aboriginal women in Canadian society are disproportionately impoverished, unemployed, and subject to violence at the hands of others, increasing the likelihood that they will be categorized as "high needs" and

thereby subject to an increased security classification. Instead of "viewing the needs of these women as critical issues to be addressed, they are seen [by CSC] only as risks leading to more restrictive conditions for confinement."[73] The system of security classification used by CSC is sexist, racist, classist, ableist, and heterosexist, and punishes women who are most disadvantaged, regardless of crime committed, by overclassifying them and subjecting them to overly secure facilities, including segregation.[74] The "one-size-fits-all" classification system employed by CSC denies the complexity of Aboriginal women's lives by attempting to dissect them into discrete categories for the purposes of "needs classification," and problematically rejects any kind of contextual consideration of the impact that the systemic marginalization experienced by Aboriginal women in Canadian society is likely to have on their social histories.

CSC's security classification system, while perhaps appearing "neutral" on the books, amounts in its effect to discrimination under Article 1 of CEDAW as a "distinction . . . or restriction made [in part] on the basis of sex which has the effect . . . of impairing . . . the . . . enjoyment of exercise by women . . . of human rights and fundamental freedoms."[75] CSC's discriminatory security classification policy infringes subsections (d) and (f) of Article 2 of CEDAW, which requires state parties to refrain from engaging in any kind of discrimination and to ensure that public authorities and institutions do the same, as well as taking steps to "abolish existing . . . regulations, customs and practices which constitute discrimination against women."[76]

Treatment of Aboriginal Inmates Based on Stereotypes

Studies and reports to date highlight the cultural inappropriateness of incarceration for Aboriginal women, as confinement "replicates the control and suppression of Aboriginal people by white colonizers from the time of first contact."[77] Incarceration subjects Aboriginal women to what are inherently colonial encounters with overwhelmingly non-Aboriginal CSC staff that all too often "offer more white authority that is sexist, racist and violent."[78] Studies chronicle a disturbing pattern of federally sentenced Aboriginal women being treated with prejudice and subjected to overt discrimination by CSC staff based on converging sex and race stereotypes and perceptions. One psychologist working within the prison system referred to federally sentenced Aboriginal Women as "animals,"[79] and incarcerated women report being referred to by CSC staff member as "squaws," invoking both their Aboriginality and sexuality in a dangerous way.[80] Treating "Native women as easy or drunken squaws . . . feed[s] negative stereotypes that will further enable individuals to abuse Native females,"[81] contributing to the cycle of dehumanization and discrimination against Aboriginal women outlined above. Indeed, derogatory stereotypes breed the conditions within which further violence against Aboriginal

women in federal prisons may occur, including physical and sexual harassment and abuse by CSC staff, such as that suffered by Ashley Smith. Many federally sentenced Aboriginal women have similar stories of horrific abuse:

> They stripped me down on 8 different occasions. The screws [guards] would restrain me and cut off all my clothes with scissors. Each hand was cuffed to the bed, each foot handcuffed to the bed with my legs spread wide open facing where the screw was sitting. . . . That still bothers me. I don't like to show my body. Mr. (guard) knows where every birth mark on my body is.[82]

Evidence indicates that from the outset of their incarceration periods, federally sentenced Aboriginal women are likely to experience harsher treatment at the hands of CSC staff than their non-Aboriginal counterparts.[83] This trend should be understood as rooted in violent stereotypes about Aboriginal persons and women in conflict with the law.[84] As one study reports, "to be a woman and to be seen as violent" is to defy common stereotypes and be "automatically feared, and labelled as in need of special handling."[85] The use of this and related stereotypes further contributes to the disproportionate overclassification of women as maximum security prisoners, where they are more likely to be subject to the trauma of indignities like strip searches or body cavity searches than their lower-security counterparts. Several studies document strip searches of women prisoners in times and manners not permitted by law, including strip searches of female prisoners by male CSC staff.[86]

It is readily apparent that the treatment of Aboriginal women prisoners based on stereotypes by CSC qualifies as discrimination under Article 1 of CEDAW and violates the principles of equality and the enjoyment of human rights enshrined in Articles 2 and 3. The fact that such discriminatory behavior takes place at the hands of CSC staff members in a government institution is indefensible, and amounts to a blatant violation of Article 2(e) of CEDAW, which requires Canada to "take all appropriate measures to eliminate discrimination against by women by any person, organization or enterprise."[87] Far from guaranteeing women "the exercise and enjoyment of human rights and fundamental freedoms," ongoing harassment and abuse by prison staff based on stereotypes about Aboriginal women violates their human rights, endangers their physical and emotional safety, and demeans their basic human dignity.[88]

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Lack of Appropriate Prison Programming

Respect for the dignity of federally sentenced Aboriginal women is further debased by the lack of appropriate programming designed and delivered in ways that meet the unique needs of incarcerated Aboriginal women. This problem has

been extensively documented in studies and reports to date, and may be the most readily addressable issue among the many plaguing CSC's treatment of federally sentenced Aboriginal women.[89] Accounts from federally sentenced Aboriginal women confirm that the services available to assist them in healing and rehabilitation, "are delivered in ways that are culturally inappropriate to [Aboriginal women] as women and as Aboriginal people."[90] Responding to this reality, many reports express concern about the "adaptation" of services and programs designed for male inmates and non-Aboriginal women and then applied to federally sentenced Aboriginal women, including, for example drug and alcohol abuse rehabilitation programs delivered by CSC staff with little expertise in rehabilitating women generally, and none working with Aboriginal women in particular.[91] This trend in "adapting" services is particularly problematic when delivering psychological and physical health care to Aboriginal women on intimate issues like sexual assault. When such services are provided to Aboriginal women only by white male physicians, psychiatrists, and psychologists, who symbolize the "worst experiences" of Aboriginal women's pasts, these women cannot, and should not be expected to "surmount the barriers of mistrust that racism has built" to access the services they require for rehabilitation and to ensure their well-being.[92]

Aboriginal women in federal institutions must have access to programs created and facilitated by people from their cultural communities. CSC has attempted to provide some limited services specifically for Aboriginal women prisoners but in doing so tends to problematically lump all Aboriginal women together.[93] Women from different backgrounds require culturally specific programming and access to Elders from their own nations and communities. If the specific nations to which Aboriginal women belong are not taken into account in assessing the programs and services that are required, "Elder services may not reflect accurately the needs of the women. Blackfoot teaching delivered to women housed in Cree territory may not be an appropriate choice."[94] Providing access to culturally appropriate services tailored to the needs of a particular woman's nation-based identity is particularly important when one considers that federally sentenced Aboriginal women are likely to be geographically removed from their families and communities because there are so few options in terms of facilities for their imprisonment.[95] Some of the most critical services for imprisoned Aboriginal women include access to sweat lodges; Aboriginal, female therapists and counsellors for survivors of sexual abuse; and access to cultural and spiritual items while in prison. Existing reports and studies also identify a uniform need for more contact with nation-appropriate Elders as imperative to the rehabilitation of Aboriginal women.[96]

CSC must accommodate the individual needs of the individual Aboriginal women incarcerated in Canadian prisons. Discrimination in access to resources for rehabilitation and health

leads to the further marginalization of Aboriginal women within the prison system because inmate participation in rehabilitation programs increases the likelihood of pre-sentence release. The inability of Aboriginal women to access and participate in programs that meet their needs is seen by the CSC as a "strike" against them, one that reduces their chances of early release. This situation amounts to systemic discrimination against women in direct violation of Article 2(g) of CEDAW. Like the examples presented above, discrimination against federally sentenced Aboriginal women in terms of service provision is a further violation of Articles 2 and 3 of CEDAW, and, again, is particularly egregious because it continues to occur at the hands of a government body despite a plethora of accumulated evidence demonstrating the existence of a problem in the CSC system, and numerous recommendations calling for change. The CSC's continued failure to effect programming changes to benefit Aboriginal women serves to "reinforce cultural, racial and gendered barriers, which are causally related to over-representation"[97] in Canadian prisons and which further entrench the devaluation of Aboriginal women in prisons and in Canadian society at large.

Taking Canada To Task On Its CEDAW Violations

The issues addressed here are certainly not exhaustive of the variety of forms of discrimination against federally sentenced Aboriginal women by the CSC, nor the host of ways that such treatment violates the principles of CEDAW. The three examples presented in the previous section are, however, broadly illustrative of Canada's failure to bring its correctional practices in line with its international commitments under CEDAW in ways that particularly disadvantage federally sentenced Aboriginal women. As catalogued in part above,[98] there have been numerous task force investigations, research reports, and commissions of inquiry that have identified, assessed, and analyzed the intricacies of the problem of discrimination against federally sentenced women in general, and Aboriginal women in particular, and have presented comprehensive recommendations for change. Without wide-ranging implementation, however, these recommendations are of little practical import—needless to say, Ashley Smith did not benefit from the wealth of largely unexecuted documentation on discrimination against federally sentenced Aboriginal women. The persistence of discriminatory practices by CSC in the face of scrutiny generated by in-depth research and investigations proves just how deeply embedded discriminatory policies and practices are in the prison system. The ongoing nature of discrimination against federally sentenced Aboriinal women is fur-

The ongoing nature of discrimination against federally sentenced Aboriginal women is further attributable to the apparent unwillingness of the Canadian government to provide leadership in this area by ordering the comprehensive institutional changes required to combat discrimination be undertaken by CSC.

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The obvious and necessary question that follows from the discussion to this point is, quite simply: what to do? The ultimate goal is clear: it is incumbent upon Canada to demand that CSC halt discrimination against Aboriginal women in its custody and ensure that the basic human rights of every incarcerated individual are honored at all times. More bureaucratic studies and analyses of the problem are unnecessary, as existing recommendations for change are myriad and generally coincide in both the concerns raised and their general approaches to the problem.[99] While these recommendations may not be perfect, nor present an absolute solution to the problem, if implemented in full, they would doubtless contribute to affecting at least some of the necessary overhaul of CSC practices and procedures, and to improving conditions for federally sentenced Aboriginal women. The "what next?," then, lies neither in furthering our understanding of the problem of discrimination against federally sentenced Aboriginal women, nor in the formulation of mechanisms to tackle the problem, but in the implementation of practical change in the Canadian prison system. In light of the marked lack of political willingness by the Canadian government to confront and take on this challenge, it is necessary to consider strategies to motivate government action on the issue of discrimination against federally sentenced Aboriginal women. One strategy could be to direct international attention to Canada's breaches of its international obligations under CEDAW though a complaint launched under a new mechanism in the CEDAW Optional Protocol.

The CEDAW Optional Protocol

On October 18, 2002, two decades after ratifying CEDAW, Canada acceded to the Convention's Optional Protocol,[100] which provides two new mechanisms to enhance oversight of compliance with CEDAW: a communications procedure allowing individual women or groups of women to submit, directly or through a representative, claims of rights violations under CEDAW,[101] and an inquiry procedure through which the CEDAW Committee may independently launch an investigation into grave or systemic violations by states parties of rights guaranteed under the Convention.[102] The communications procedure provides a possible new avenue for pursuing a formal complaint to the CEDAW Committee highlighting the ways in which Canada's treatment of federally sentenced Aboriginal women amounts to multiple breaches of its CEDAW obligations, documenting the Canadian government's ongoing failure to comprehensively address the problem as a further marginalization of the rights guaranteed by CEDAW, and calling for a remedy that might include, for example, the taking of

immediate action by the Canadian government and CSC to implement the recommendations put forward by previous inquiries and investigations into the treatment of federally sentenced Aboriginal women.

Complaint mechanisms such as the Optional Protocol under international human rights instruments provide a valuable means of directing international attention to a given issue, and such international scrutiny can serve as the "spark" required to initiate change at the national level. For example, in 1977 Canadian Sandra Lovelace, a Maliseet woman from the Tobique Reserve in New Brunswick, initiated a complaint[103] to the UN Human Rights Committee, constituted under the International Covenant on Civil and Political Rights (ICCPR).[104] Her complaint alleged that her rights[105] under the ICCPR had been violated by section 12(1)(b) of Canada's Indian Act,[106] in accordance with which Ms. Lovelace had lost her "Indian" status and associated rights upon her marriage to a non-Aboriginal man.[107] She claimed that Canada's Indian Act violated her rights by denying her Indian status and the right to be part of her community and culture. Like the CEDAW Committee, the Human Rights Committee is charged with the responsibility of considering individual complaints of alleged violations of the ICCPR and, after assessing Ms. Lovelace's claim, the Committee concluded in 1981 that the "the communication of Sandra Lovelace disclosed that Canada had breached the terms of the Covenant."[108] In deciding in her favor, the Committee found that the Indian Act contravened Article 27 of the ICCPR, which states, "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[109] The Lovelace case generated interest both in Canadian society and in the international arena, and following its success, the Canadian government in 1985 repealed section 12(1)(b)[110] and reinstated[111] the Indian status and associated rights of Aboriginal women and their children.[112]

Sandra Lovelace's successful complaint to the UN Human Rights Committee of the ICCPR and the subsequent amendments to the Indian Act adopted by the Canadian government provide an important precedent for assessing the possible impact that a complaint to the CEDAW Committee under the Optional Protocol could have in increasing awareness about the issue of discrimination against federally sentenced Aboriginal women and igniting the beginnings of change in this area.[113] It is notable that Lovelace's case was one of many initiatives undertaken during decades of legal and political struggle and activism against the Indian Act,[114] all of which helped to establish the foundation for the legislative

It is notable that Lovelace's case was one of many initiatives undertaken during decades of legal and political struggle and activism against the Indian Act,[114] all of which helped to establish the foundation for the legislative amendment to the Indian Act that followed her complaint.

amendment to the Indian Act that followed her complaint. Similarly, there has been important groundwork laid on the issue of discrimination against federally sentenced Aboriginal women, including, for instance, the 2003 human rights complaint by the Canadian Association of Elizabeth Fry Societies (CAEFS), on the treatment of federally sentenced women at the hands of the CSC, and the subsequent investigation and report by the CHRC.[115] In 2002, on the occasion of the CEDAW Committee's review of Canada's fifth compliance report,[116] the Canadian Feminist Alliance for International Action (FAFIA) submitted an alternative report to the CEDAW Committee entitled *Canada's Failure to Act: Women's Inequality Deepens*,[117] demonstrating "that many laws, policies and programs necessary to ensure women's inequality have not been implemented, or alternately, have been eliminated."[118] The FAFIA report included specific reference to CSC's treatment of federally sentenced Aboriginal women.[119] Following its assessment of Canada's official fifth report, the CEDAW Committee reprimanded Canada for its failure to address the "persistent systematic discrimination faced by aboriginal women in all aspects of their lives."[120] These and other initiatives have firmly established the existence of the problem of discrimination against Aboriginal women in Canada, and would provide strong support for a complaint launched pursuant to the CEDAW Optional Protocol.

Is CEDAW Enough?

Sandra Lovelace's case demonstrates the potential that an international instrument like CEDAW represents as one possible avenue through which Canada's failure to halt discrimination against federally sentenced Aboriginal women could be brought to light and condemned on the international stage. CEDAW is not, however, a panacea for the complex web of factors that create and sustain discrimination against Aboriginal women both in and out of prison. While it is often championed as the "gold standard" in women's rights, it is worthwhile to question the principles and presumptions underpinning CEDAW itself, as our "ability to articulate a vision of equality that resonates domestically and internationally to enable full participation and membership of citizens in all societies is particularly pressing in our increasingly interconnected global community."[121] In light of these considerations, we must then consider whether CEDAW is, in fact, an appropriate tool for addressing discrimination against federally sentenced Aboriginal women.

The first issue that arises in this consideration is whether CEDAW's overarching objective—*equality between men and women*—is the kind of equality that we ultimately desire.[122] The language of CEDAW calls not for women's equality in its own right, but for women's equality *with men*, invoking a comparative approach between men and women by requiring

that women be treated *the same as* men.[123] This approach is problematic in that it establishes men as the "norm" and, by requiring simply that women be treated the same as men, relies on a formalistic vision of equality that avoids recognition of the fact that women's lived realities differ from those of men and are uniquely defined, in part, by their gender. Substantive equality for women requires more than simply gender parity with men and must be protected and promoted in its own right.

CEDAW's "women = men" approach to equality warrants further critique when one considers that substantive equality for women ultimately calls for systemic change in societies around the world, a goal that CEDAW fails to envisage in the language of its text. By calling only for the realization of formal equality between men and women within the existing confines of our societies, CEDAW fails to "challenge privileged understandings of the world and privileged players' understandings of themselves."[124] CEDAW thereby permits the existing structures of our societies and institutions—and the prevailing norms of gender, race, class, (dis)ability, and sexuality that create and sustain them—to remain the same. It fails to acknowledge that the social, political, economic, and legal systems within which men and women exist are themselves patriarchal, colonial creations that inherently and inevitably disadvantage nondominant groups. Is it possible to truly eradicate sex discrimination within a patriarchal framework? To eliminate racism in a neocolonial society? The failure to recognize or address these questions is a serious limitation of CEDAW and restricts its utility as a tool with which to advocate for fundamental, systemic change.

Finally, CEDAW does little to acknowledge the diversity of interests and needs among different women, and thereby falls prey to the problems of essentialism. At least in terms of its technical language, CEDAW may be poorly equipped to recognize and address the interlocking forms of oppression that create and inform discrimination on the ground of gender, including race, class, disability, and sexual orientation. This is particularly troubling in light of the topic under consideration here. Given that the focus of CEDAW is on women's rights, recourse to this tool in combating discrimination against federally sentenced Aboriginal women may inappropriately risk marginalizing Aboriginal identities for the sake of women's rights, such that Aboriginal specificities become lost in the process of a CEDAW complaint.

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These limitations beg the question of whether CEDAW is in fact the proper tool with which to advance a complaint on discrimination against federally sentenced Aboriginal women in Canada. Ultimately, the answer to this question lies outside the

margins of this or any other research-based endeavor, and lies only with the opinions and perspectives of federally sentenced Aboriginal women themselves. In assessing the suitability of CEDAW as an instrument for fighting for the rights of federally sentenced Aboriginal women, the answer will only come from "*listen[ing] seriously* to the concerns, priorities, and experiences expressed by [Aboriginal] communities,"[125] and working cooperatively with them to effect the changes they require. The starting point for action must be "not in abstract discussions but in the experiences of the women themselves,"[126] so that before any action under CEDAW is undertaken, like that contemplated here, federally sentenced Aboriginal women must decide whether a CEDAW complaint reflects their perspectives, wishes, and choices.

As such, the present inquiry maintains first and foremost that discrimination against federally sentenced Aboriginal women violates CEDAW in multiple ways, but certainly does not advance the proposition that CEDAW is *the* quintessential, preferable, or one-and-only instrument for dealing with the problem of discrimination against federally sentenced Aboriginal women. It is simply my contention that CEDAW *could* be considered as *a possible* measure contributing to the eradication of discrimination against Aboriginal women in Canadian prisons, subject to the needs and desires expressed by federally sentenced Aboriginal women themselves. CEDAW is certainly not the *only* tool that could or should be employed to this end,[127] nor is it necessarily the "best" tool, particularly in light of its failure to deal with the interlocking forms of oppression that federally sentenced Aboriginal women face.[128] It is simply one option that might contribute to the pursuit of the goal of ending discriminatory practices by CSC against federally sentenced Aboriginal women.

Conclusion

Some have characterized Ashley Smith's treatment while in the custody of CSC as creating "what amounts to an institutional suicide machine."[129] The racist, sexist, and ultimately illegal discrimination that characterizes the CSC's treatment of Aboriginal women is a stark violation of Canada's international obligations under CEDAW. In light of the foregoing, it is particularly ironic that Canada's CEDAW commitments have helped the country develop a reputation in the international community as a world leader in women's human rights.[130] While the Canadian government establishes itself internationally as a bastion for women's rights, its own policies and practices at home continue to expose women to discriminatory treatment with consequences that, as in the case of Ashley Smith, include death. Quite simply, the evidence indicates that Canada does not take the treatment of Aboriginal women, in prison and elsewhere, seriously, amounting to a devastating national failure. In light of the persistent refusal of the Canadian government to

take steps necessary to halt discrimination against federally sentenced Aboriginal women, this paper has argued that the CEDAW framework represents one possible route through which the government's failure to act could be exposed to the international community, potentially instigating the beginnings of real change.

Discrimination against Aboriginal women in federal prisons is nothing short of a national crisis that calls for immediate, extraordinary action. It is impossible for the Canadian government to continue to deny or ignore that discrimination against federally sentenced Aboriginal by CSC systems and staff is a grave problem, particularly in the wake of Ashley Smith's death, nor can the government plead ignorance or uncertainty in how to address the problem in light of the multitude of studies and recommendations that exist. Ashley Smith is not the first, and is unlikely to be the last casualty of Canada's colonial prison machine,[131] and her story demands that we ask both what is wrong with our prison system,[132] and, perhaps more fundamentally, what is wrong with *ourselves*? Why is there no public outrage? Dare we consider how the response might be different if the victims of the CSC's discrimination were white women or white men? While CEDAW may not provide a full or final answer, it should be regarded as one possible course of action in the fight to end the inhumane treatment of federally sentenced Aboriginal women at the hands of CSC—a fight that warrants and requires the deployment all of the legal, political and social weapons we can muster.

Ashley Smith is not the first, and is unlikely to be the last casualty of Canada's colonial prison machine,[131] and her story demands that we ask both what is wrong with our prison system,[132] and, perhaps more fundamentally, what is wrong with ourselves? Why is there no public outrage?

Endnotes

1. A post-mortem examination concluded that Smith died of "self-inflicted asphyxiation"; however, the events leading up to her death are unknown (or at least unpublished) and police have confirmed that Smith "did not hang herself." See Dalton, "Inmate's Death.".

2. Cheney, "How Prison 'Only Made Her Worse.'" The media reports issued in the wake of Smith's death fail to describe her as an Aboriginal woman, and none make mention of the particular Aboriginal nation to which Smith belonged.

3. Pate, Presentation at the University of Ottawa. Three official inquiries are pending and four corrections officers—three guards and a supervisor—are facing criminal negligence charges in connection with Smith's death.

4. Federally sentenced inmates are those sentenced to a term of imprisonment of two-years-plus-a-day, and serve their sentences in federal prisons as mandated by the *Criminal Code,* R.S.C. 1985, c.C-46, s. 743.1.

5. The term *Aboriginal peoples* is defined in the *Constitution Act, 1982,* s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 as including "the Indian [registered and not], Inuit and Métis people

of Canada." This definition is imprecise as it fails to reflect the particular identities of individual Aboriginal nations including, for example, the Mi'kmaq, Mohawk, Cree, Saulteaux, and Dene; however, it is the existing definition in law. Despite its inherent difficulties, I employ the term *Aboriginal* throughout the discussion which follows, in keeping with the terminology employed by many of the Aboriginal authors whose work forms the basis of my inquiry. The term *Indigenous* could also be used in this context, and is indeed more widely employed in the international arena, as noted, e.g., by Amnesty International, who note: The "term 'Indigenous' refers to all descendants of the original inhabitants of the territories that now make up Canada. This includes the First Nations, the Inuit and the Métis. In Canada, the word 'Aboriginal' has the same meaning and is more widely used." See Amnesty International, *Stolen Sisters*. For further analysis on the significance and limits of terminology, see e.g., Taiaiake, *Wasase*.

6. *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981) [hereinafter CEDAW]. The full text of CEDAW is available online: United Nations Division on the Advancement of Women <http://www.un.org/womenwatch/daw/cedaw/>.

7. Generally speaking, public international law concerns the structure and conduct of states and intergovernmental organizations. The United Nations is responsible for much of the current framework of international law.

8. CEDAW, art. 3. This categorical approach to understanding locations of oppression is endemic in law. Domestically, it is evident in the use of comparator groups in judicial analysis of Canada's constitutional equality guarantee in the *Canadian Charter of Rights and Freedoms*, s.15 Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. For a critique of this approach in domestic law, see, e.g., Gilbert and Majury, "Critical Comparisons."

9. Smith, *Conquest.*

10. Razack, *Looking White People in the Eye,* 12. See also Crenshaw, "Mapping the Margins."

11. Ibid., 13.

12. Monture-Angus, The Lived Experience.

13. CEDAW, Preamble.

14. I do not intend to homogenize the identities of Aboriginal women or to generalize about their experiences either in or outside of prison. As emphasized by Sugar and Fox, "Survey,", the experience of federally sentenced Aboriginal women can only be understood "through eyes and feelings that are FEMALE, ABORIGINAL AND IMPRISONED" [emphasis in original]. My reliance on second-hand statistics generated by government bodies is a limitation of this work.

15. Canadian Association of Elizabeth Fry Societies, "Submission of the Canadian Association of Elizabeth Fry Societies to the CSC Review Panel" [hereinafter CAEFS, "CSC Submission"]. See also Office of the Correctional Investigator [hereinafter Correctional Investigator], *Annual Reports.*

16. Monture-Angus, The Lived Experience.

17. See e.g. *R. v. Gladue*, [1999] 1 S.C.R. 688.

18. Monture-Angus, The Lived Experience. To require Aboriginal people to act in ways contrary to their basic beliefs and rules of behaviour in order to comply with the colonial norms of the justice system is itself a discriminatory infringement of their rights.

19. CAEFS, "CSC Submission."

20. Correctional Investigator, "Report Finds Evidence."

21. CAEFS, "Aboriginal Women." So long as Aboriginal persons continue to live under the *Indian Act*, decolonization will remain unrealized.

22. Monture-Angus, The Lived Experience. A gendered understanding of the colonial encounter is not without criticism, in part because this approach has been interpreted as contradicting the teachings of many Aboriginal nations in favour of building connections between men and women, as opposed to separation. See, e.g., Lindberg "Not my Sister."; and Canada, Report of the Task Force on Federally Sentenced Women, *Creating Choices* [hereinafter *Creating Choices*].

23. See, e.g., Manitoba, *Report*. The Report notes: "The status of Aboriginal women in the city of Winnipeg is particularly disturbing. Forty-three per cent of Aboriginal families are headed by single women, compared to 10% of non-Aboriginal families. . . . While the 'official' unemployment rate has been estimated at 16.5% for Aboriginal women, official statistics typically do not count those who are not actively looking for work. Many Aboriginal women do not actively seek work because there is no employment available to them, or because it is impossible for them to work, due to their family circumstances or for other reasons. The actual employment rate for female status Indians age 15 or more has been estimated as low as 24%. These numbers appear to be due, in part, to an absence of educational and employment opportunities for Aboriginal women."

24. Sugar and Fox, "Survey."

25. MacDonald, *Federally Sentenced Women.*

26. While I acknowledge that many federally sentenced women have mental health needs, I oppose the tendency to pathologize women's resistance to imprisonment and coping mechanisms while imprisoned as "mental disorders." See Monture-Angus, "Considering Colonialism."

27. Green, "Profile."

28. Razack, "Looking White People in the Eye," 64. A 1996 report from the government of Canada indicated that Aboriginal women with status under the Indian Act, between the ages of twenty-five and forty-four were five times more likely than all other women in the same age bracket to die as the result of violence. See *Aboriginal Women.*. Smith, *Conquest,* 13, notes that sexual violence against Aboriginal women exists to such a wide-ranging extent that the "phenomenon indicates the extent to which our communities have internalized self-hatred."

29. Sugar and Fox, "Survey," 559.

30. Monture-Angus, The Lived Experience.

31. Razack, "Gendered Racial Violence."

32. Smith, *Conquest,* 10. Smith provides an interdisciplinary historical analysis of the ways that Aboriginal women have been subjects of colonial genocide through the active degradation and destruction of their bodies in the United States context. Her work provides an important account of the ways in which sexual violence continues to be utilized as a tool of patriarchy and colonialism in Aboriginal communities through genocidal state initiatives. Smith addresses both more obvious forms of sexual violence such as forced sterilization, abortion, and child abuse in boarding schools, as well as providing a complex investigation of spiritual rape and the ways that destruction of land has direct links to Native women's bodies and their capacities for choice and control over their own bodies.

33. For example, in her examination of the use of Aboriginal communities in drug trials and experimental medical techniques, Smith, *Conquest*, 117, notes "Native people have been seen as 'rapable' because they resemble animals to the colonizers" and animals are less than human.

34. Pate, Presentation at the University of Ottawa, who noted further that prisons "are a microcosm of the worst practices in society."

35. Razack, "Gendered Racial Violence," 126.

36. Sugar and Fox, "Survey.".

37. Razack, "Gendered Racial Violence," 155.

38. Amnesty International, *Stolen Sisters..*

39. Ibid., 3-4, 28.

40. Ibid., 2.

41. Native Women's Association of Canada [NWAC], *Sisters in Spirit* [emphasis added].

42. Canada, *Commission of Inquiry* [hereinafter Arbour Report].

43. CEDAW, Introduction.

44. By a vote of 130 to none with 10 abstentions.

45. CEDAW entered into force faster than any previous human right convention to date. The entrenchment of CEDAW into international law was the culmination of more than thirty years of work by the United Nations Commission on the Status of Women to codify international legal standards for women.

46. Human Rights Watch, *CEDAW.*

47. See, e.g., CEDAW, art.7

48. See, e.g., ibid., art.12 .

49. See, e.g., ibid., art.5.

50. Ibid., Preamble.

51. Ibid., art.1.

52. Ibid., art.2.

53. Ibid., art.3.

54. Ibid., art.2(a).

55. Ibid., art.2(c).

56. Ibid., art.4.1.

57. Pursuant to CEDAW, ibid., art.18. The Committee is composed of twenty-three experts nominated by their respective governments and elected by the states parties.

58. The Committee is responsible for monitoring national implementation of CEDAW by states parties. During its biannual sessions, the Committee members discuss reports with government representatives from the reporting country and explore areas for further action. The Committee also makes general recommendations to states parties on matters concerning the implementation of CEDAW and the elimination of discrimination against women.

59. Currently, 185 countries, representing over 90 percent of United Nations members, are party to CEDAW. For details see CEDAW.

60. The concept of being "legally bound" in international law is more limited than at national law, because enforcement mechanisms in the international arena are scarce, and while disincentives like country blacklisting and "self-help" do provide some inducement for compliance, the lack of enforcement mechanisms is considered a shortcoming of the UN system of international law. See generally, Kirgis, *ASIL Insights.*

61. Correction Service of Canada, *Human Rights.*

62. These include: *Creating Choices*; Manitoba, Public Inquiry; the Arbour Report; Morin, *Whatever Happened;*, Hannah-Moffat, *Punishment in Disguise;* Monture-Angus, The Lived Experience; CAEFS, "CHRC Submission;" Canadian Human Rights Commission, *Protecting Their Rights* [hereinafter CHRC Report]; CAEFS, "CSC Submission;" and a multitude of position and issue papers by groups including Strength in Sisterhood, the National Association of Women and the Law, the Native Women's Association of Canada, Amnesty International, and the Women's Legal Education and Action Fund (LEAF).

63. Arbour Report, 239.

64. Monture-Angus, The Lived Experience.

65. Correctional Investigator.

66. Ibid.

67. Sugar and Fox, "Survey."

68. In its 2003 investigation, CHRC Report, the CHRC reported that one Aboriginal woman had been in segregation for 567 days and spent a significant part of 2005 unconscious and on life support as a result of her 'treatment' within a segregated mental health unit in prison. Another Aboriginal woman spent more than 1,500 days—the majority of her sentence—in isolation.

69. Arbour Report, 187.

70. CSC and National Parole Board "records indicate that less than half of 1% (i.e. 0.39%) of federally-sentenced women released into the community recidivate for violent offences." See CAEFS, "CSC Submission."

71. Morin, *Whatever Happened,* Part 3.

72. Amnesty International, *Equal Rights.* 3.

73. Ibid.

74. The Canadian Association of Elizabeth Fry Societies reports, "it has been repeatedly recognized that the current system, which was designed by men, results in significant over classification when applied to federally sentenced women. ...41% of federally sentenced women who are classified as maximum security women are Aboriginal, whereas Aboriginal women represent only 18.7% of the total population of federally sentenced women." CAEFS, *Classification and Carceral Placement.*

75. CEDAW, art.1.

76. Ibid., art.2(f).

77. CAEFS, "CHRC Submission.".

78. Sugar and Fox, "Survey," 560.

79. Morin, *Whatever Happened,* Part 4.

80. Ibid.

81. Anderson, *A Recognition,* 112.

82. Sugar and Fox, "Survey."

83. See, e.g., McIvor and Johnson, *Detailed Position.*

84. Though "women in conflict with the law" is the accepted understanding of women's engagement with the criminal justice system, a more accurate representation would, I believe, reverse this equation and locate blame where it is due by situating the *law as in conflict with women.*

85. Sugar and Fox, "Survey."

86. See, e.g., the Arbour Report; and Pate, "50 Years."

87. CEDAW, art. 2(e).

88. The Preamble to CEDAW, ibid., affirms that "all human beings are born free and equal in dignity and rights" and that "discrimina-

tion against women violates the principles of equality of rights and respect for human dignity."

89. In that altering program offerings and service providers could be done quickly and with immediate effect, without requiring, for example, the kind of normative overhaul that is likely required to remedy the discriminatory application of security classification systems.

90. Sugar and Fox, "Survey."

91. CAEFS, "CHRC Submission."

92. *Creating Choices*, 10 (quoting a statement by Aboriginal parolee).

93. As noted by Monture-Angus, The Lived Experience, and others, this problem stems in part from the fact that CSC does not keep nation-specific statistics on Aboriginal women, thus limiting its ability to develop and provide specific programming appropriate to the unique needs of members of individual Aboriginal nations.

94. Ibid.

95. Arbour Report, 200.

96. Including the reports and studies listed in endnote 62.

97. Monture-Angus, The Lived Experience.

98. Including those listed in endnote 62.

99. For instance, Arbour Report recommendations, and those of the CHRC Report both include: 1) the development of an external oversight body to enforce compliance with the law and human rights; 2) the development of a prisoner court challenges fund designed to enable prisoners to have access to avenues to remedy any further breaches of Canadian law and international obligations; and 3) compensation for past and ongoing breaches of inmate's rights.

100. *The Optional Protocol* [herein after Optional Protocol].

101. The Optional Protocol's communications procedure has several thresholds that must be met before the Committee will consider the case, including the requirement that all available national remedies must have been pursued prior to submitting a claim under the communications procedure to the CEDAW Committee, see *ibid*., art.4. If a claim meets the threshold requirements, it will be reviewed by a Committee Working Group that will decide whether a violation of CEDAW has occurred and if so, will identify steps that the state party must take to remedy the infringement. The state party then has six months to report back to the Committee on the remedial steps it has taken. I do not address here whether the requisite thresholds mandated by the Optional Protocol's communications procedure are or could be met in the context of discrimination experienced by federally sentenced Aboriginal women, however this is an issue that would have to be addressed should this mechanism be employed in bringing forward a formal complaint.

102. The Optional Protocol, ibid., art. 8(1), requires that the violation be "grave or systematic," a classification generally interpreted to mean a violation of the right to life or integrity of the person. The Committee can decide to initiate an inquiry whenever reliable information (including press reports, NGO reports or information from other UN bodies) indicating the existence of grave or systemic violations comes to its attention, with or without the consent of the state party in question. The Committee will gather and review information on the alleged violation and then, if an infringement of rights has occurred, will identify remedial actions to be taken by the state party.

103. See the *Case of Sandra Lovelace*. The complaint was initiated accordance with the procedures specified in the Optional Protocol. Like CEDAW's Optional Protocol, that of the ICCPR establishes a mecha-

nism whereby individuals may file written complaints with the Human Rights Committee against states parties to the Protocol, alleging noncompliance with the provisions of the ICCPR.

104. *International Covenant on Civil and Political Rights* [hereinafter ICCPR].

105. Including ICCPR, ibid., art. 23(1) (protection of the family), art. 23(4) (equality of spouses in marriage), art. 26 (equality before the law, equal protection of the law and protection against discrimination), and art. 27 (right of individuals belonging to minorities to enjoy their culture, practice their religion , and use their language in community with others of their group).

106. *Indian Act*.

107. There was no similar loss of status accorded a man who is a registered Indian for the purposes of the *Indian Act, ibid.,* upon marriage to a non-Aboriginal woman; in fact, a non-Aboriginal woman who marries an Aboriginal man *acquires* Indian status.

108. Bayefsky, "The Human Rights Committee," 244.

109. ICCPR, art. 27.

110. On June 28, 1985, Parliament passed *An Act to Amend the Indian Act* [Bill C-31], amending the Indian Act to allow Aboriginal women the right to keep or regain their status even after marrying a non-Aboriginal spouse (Article 6.1), and to grant status to the children (but not grandchildren) of such a marriage status (Article 6.2).

111. Article 6.2 of Bill C-31, *ibid.,* put conditions on the recognition of children born to Aboriginal women and non-Aboriginal men: Aboriginal mothers who had restored status could pass that status on to their children, however that status could only be passed on to the *next* generation—for instance, Sandra Lovelace's grandchildren—if both spouses were registered Indians. The situation was even more problematic for single mothers: if a biological father refused to acknowledge his child, Bill C-31 automatically assumed the child was not a status Indian.

112. Bill C-31, ibid., did not by any means rid the Indian Act of legislative discrimination against Aboriginal women. See, e.g., Jones, "Towards Equal Rights;" Jordan, "Residual Sex Discrimination." See also *Canadian Aboriginal Women.*

113. In weighing the precedential value of the Lovelace case to a CEDAW complaint like that contemplated here, there are important distinctions to be made between the two cases. Most obviously, the Lovelace case dealt with a particular piece of discriminatory legislation and the remedy sought was accordingly a legislative one, while a CEDAW complaint on CSC discrimination against federally sentenced Aboriginal women would allege a violation of international law based not on legislation but upon CSC policies, some of which may be formally codified, like the security assessment procedures outlined above, as well as the uncodified discriminatory attitudes and behaviour of CSC staff members, including the treatment of Aboriginal women based on stereotypes. Building a case for the existence of systemic discrimination on the basis of uncodified institutional norms can be somewhat more difficult than simply alleging that a piece of legislation is discriminatory in its purpose or effect, however it is certainly not impossible. See, e.g., *Jane Doe*, where the claimant successfully sued the Toronto Police for negligent investigation of her sexual assault. She further proved that the police had violated her right to equality under the *Canadian Charter* by demonstrating how negative stereotypes about women inform police policy and practice when responding to sexual assault generally, resulting in systemic discrimination against women in the policing of this crime.

114. Including, e.g., the case of *Attorney-General (Canada)*, where Jeannette Corbière-Lavell and Yvonne Bédard claimed that section 12(1)(b) of the Indian Act amounted to discrimination on the basis of sex. The Supreme Court of Canada held that section 12(1)(b) of the Indian Act did not violate the right to "equality before the law" guaranteed by the *Canadian Bill of Rights*. The struggle against the Indian Act was also part of the motivation behind the creation of the Native Women's Association of Canada in 1974, an organization that continues to pursue its "collective goal to enhance, promote, and foster the social, economic, cultural and political well-being of First Nations and Métis women within First Nations, Métis and Canadian societies." See NWAC, Home Page.

115. See endnote 62.

116. CEDAW, *Fifth Report.*

117. FAFIA, *Canada's Failure.* FAFIA plans to submit its second alternative report on the occasion of the CEDAW, *Sixth and Seventh Reports.*

118. FAFIA, "Canada's Sixth and Seventh Periodic Reports."

119. See FAFIA, *Canada's Failure,* 48-51.

120. See CEDAW, *Concluding Observations,* paras. 361-62.

121. L'Heureux-Dubé, "Preface," 6.

122. See e.g. CEDAW, art. 15, which provides, "States Parties shall accord to women equality with men before the law."

123. The comparative analytical framework of Canada's constitutional equality guarantee falls prey to similar critique. See e.g. Gilbert and Majury, "Critical Comparisons;" Moreau, "The Wrongs," 31.

124. McIntyre, "Answering," 108.

125. Williams, "Vampires," 763. This sentiment echoes that of Monture-Angus, The Lived Experience, who notes, "[i]t should be unnecessary to further document forms of discrimination that have already been acknowledged by government. Our energies should rather be devoted to securing remedial action."

126. Sugar and Fox, "Survey."

127. To this end, arguments paralleling that envisioned here could be developed with reference to Canada's obligations under instruments including the UN *International Convention on the Elimination of All Forms of Racial Discrimination* [hereinafter CERD] and the UN *Standard Minimum Rules for the Treatment of Prisoners.*

128. It is notable that in spite of what might be classified as a general failure of international instruments to comprehensively address interlocking oppressions, the Native Women's Association of Canada (NWAC) has expressed its commitment to "promoting gender issues at the international level," noting, "[n]ot only is an Aboriginal female voice needed at such forums as the United Nations or regional organizations such as the Organization for American States, but Indigenous issues as a whole need to be advocated for collectively with fellow Indigenous peoples." To that end, NWAC participates in international initiatives including Beijing +5 and Beijing +10. See NWAC, "International Work."

129. Cheney, "How Prison," A9.

130. Since its ratification of CEDAW more than two decades ago, "Canada has...undertaken a range of other international commitments relating to women's human rights, and has had a very high profile in international fora as an advocate for women's rights." McPhedran *et. al., The First CEDAW,* 35.

131. See e.g., the Arbour Report, 96, documenting an epidemic of suicides and deaths among women at the Prison for Women prior to its closure.

132. Kim Pate cited in Cheney, "How Prison," A9.

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